

Notice of Decision and Reasons for Decision

Applicant:	'DJ3'
Agency:	Department of Health
Decision date:	2 July 2021
Exemption considered:	Section 33(1)
Citation:	'DJ3' and Department of Health (Freedom of Information) [2021] VICmr 211 (2 July 2021)

FREEDOM OF INFORMATION – COVID-19 pandemic – date of death – location type – reidentification of data – personal affairs information

All reference to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

Notice of Decision

I conducted a review under section 49F of the Agency's decision to refuse access to a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision.

I am satisfied section 33(1) applies to the dates of death in the document.

As the Agency released an edited copy of the document, I am satisfied it is practicable to delete the exempt information. Accordingly, I have granted access to the document in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
2 July 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 1. Covid doctor certified deaths - actual day of death and sector of individual i.e. aged care, health services or public from January 2020 to current date [date].
 2. Covid PCR positive tests (cases) - actual day swab taken and day test performed from January current date [date].
2. In response to the Applicant's request, the Agency created documents in accordance with section 19.
3. Section 19 provides that, where a document does not exist in discrete form and an agency can create a document using a computer to generate the information sought (for example, by interrogating a database of information), the Agency must deal with the request as if it were for a document in existence.
4. The Agency granted access to one document in part in relation to part 1 of the Applicant's request, with certain information exempted from release under section 33(1), and granted access to documents in full in response to part 2 of the Applicant's request. The Agency's decision letter sets out the reasons for its decision.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to information in relation to part 1 of the Applicant's request.
6. I have examined a copy of the document subject to review, namely the document created by the Agency in response to part 1 of the Applicant's request (the **Document**).
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
10. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemptions

Section 33(1)

11. A document is exempt under section 33(1) if two conditions are satisfied:

- (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;¹ and
- (b) such disclosure would be 'unreasonable'.

12. Section 33(1) also applies to the personal affairs information of a deceased person.

Does the document contain the 'personal affairs information' of individuals other than the Applicant?

- 13. Information relating to a person's 'personal affairs' includes, but is not limited to, information that identifies any person, or discloses their address or location. It also includes any information from which such information may be reasonably determined.²
- 14. Personal affairs information that relates to an individual 'concerns or affects that person as an individual'.³
- 15. A document will disclose personal affairs information if it is capable of, either directly or indirectly, identifying a particular individual whose personal affairs are disclosed. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to potentially identify a third party.⁴
- 16. The Document is a table of data comprising three columns, being 'case' (the case number listed from 1 to 819), the 'date of death' and the 'sector' (being either 'hospital', 'public – died at home', or 'aged care').
- 17. The Agency determined information under the heading 'date of death' is exempt from release under section 33(1). The Agency granted access to the remainder of the document.
- 18. In its decision letter, the Agency advised:

[Section 33(1)] has been used to remove the dates of deaths for COVID-19 deceased cases as the release of this information may lead to the individuals being identified and this is considered to be an unreasonable disclosure of information.
- 19. In response to enquiries from OVIC staff, the Agency advised:

In consideration of the additional contextual information and other datasets already available in the public domain, by way of media releases, news articles, social media and so on, the department is of the view that the release of the requested information, when combined with other available data sets and auxiliary information, may lead to individuals being identified.
- 20. In their review application, the Applicant states:

The data does not pose any indicators to identify an individual and therefore is not an infringement on anyone's privacy by releasing the date of death as declared by DHHS [former Department of Health and Human Services] as reason for non-supply.
- 21. The Applicant also states they seek to 'form an accurate timeline of deaths from covid during the peak wave period, in that there were days of 'data dump' on the Department of Health's website that do not accurately show date of passing'.

¹ Sections 33(1) and (2).

² Section 33(9).

³ *Hanson v Department of Education & Training* [2007] VCAT 123.

⁴ *Ibid.*

22. While I note the Applicant's views on the data they seek in the Document, I agree with the Agency's submission that the deceased individuals may be able to be re-identified by linking the exact date of death dataset with other publicly available information regarding the death of those persons. The ability to re-identify an individual by using information in a dataset combined with other information in the public domain was the subject of an investigation report by issued by the Victorian Information Commissioner.⁵ While that investigation report concerns 'personal information' in the context of the *Privacy and Data Protection Act 2014* (Vic), I consider the same principles apply in the context of reidentification of a person's 'personal affairs information' for the purpose of section 33(1) of the FOI Act.
23. Accordingly, I accept the information exempted by the Agency in the Document is 'personal affairs information' for the purpose of section 33(1) as I am satisfied it can be used to reidentify the individuals whose personal affairs are disclosed in the Document.

Would disclosure of the personal affairs information in the document be unreasonable in the circumstances?

24. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's personal privacy in the circumstances.
25. In *Victoria Police v Marke*,⁶ the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'. The Court further held, '[t]he protections of privacy, which lies at the heart of s 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded to a lesser or greater degree'.⁷
26. I note there are various data sets available on public accessible websites, including the dates of deaths of individuals from COVID-19 in Victoria, including the number of deaths that occurred in residential aged care. However, I consider the combination of the data subject to this review does not appear to be publicly available.
27. I have considered the nature of the personal affairs information and consider information in relation to a deceased person's date of death and the location of their death due to COVID-19 is personal and sensitive in nature.
28. The Agency did not consult with the deceased persons' next of kin in accordance with section 33(2B). I agree it would not be practicable to do so given the sensitivity of the information in the context of its connection to the deceased individuals and the circumstances of their death.
29. While I acknowledge the Applicant may not necessarily wish to reidentify the deceased individuals or publicly disclose information in the Document, given the nature of release under the FOI Act is unrestricted and unconditional, it is relevant to consider the potential consequences of the further dissemination of the document beyond the Applicant.
30. Noting the ability to reidentify the deceased persons, I consider it would be reasonably likely their next of kin or other family members could also be identified and contacted regarding the death of their relative.

⁵ Office of the Victorian Information Commissioner, *Disclosure of myki travel information Investigation under section 8C(2)(e) of the Privacy and Data Protection Act 2014 (Vic)* published on 15 August 2019 at https://ovic.vic.gov.au/wp-content/uploads/2019/08/Report-of-investigation_disclosure-of-myki-travel-information.pdf. In particular, see [71]-[79] and [96].

⁶ [2008] VSCA 1653 at [42].

⁷ [2008] VSCA 218 at [79].

31. In this regard, I am cognisant of the sensitivity and associated family trauma connected to the death of a large number of elderly persons from COVID-19 while in residential aged care.
32. As such, I consider the deceased persons' next of kin would be reasonably likely to object to the release of the information in the document, even in its current form given the ability for individuals to be reidentified.
33. The Applicant did not provide any specific information as to any public interest that would be promoted by release of the personal affairs information in the documents.
34. In the circumstances, I do not consider there is a broader public interest that would be served by disclosure of the personal affairs information in the documents.
35. Rather, I consider the public interest weighs against the disclosure of such personal and sensitive information.
36. In my view members of the public would expect the Agency to maintain the confidentiality of such information where it pertains to deceased individuals in circumstances where they can be reidentified.
37. In my view, disclosure of such sensitive and personal information would undermine the community's trust in the Agency maintaining the confidentiality of the personal affairs information of the deceased persons in circumstances where a deceased person can be re-identified through the release of a specific dataset.
38. In determining whether disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. However, I do not consider this to be a relevant factor in the circumstances.⁸
39. Having weighed the above factors, I am satisfied disclosure of the personal affairs information in the Document would be unreasonable and is exempt from release under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

40. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable for to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
41. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.¹⁰
42. I have considered the effect of deleting exempt information from the documents in accordance with section 25. As the Agency released an edited copy of the document, I am satisfied it is practicable to delete the exempt information.

⁸ Section 33(2A).

⁹ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

¹⁰ *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

Conclusion

43. On the information before me, I am satisfied section 33(1) applies to the dates of death in the Document.
44. As the Agency released an edited copy of the Document, I am satisfied it is practicable to delete the exempt information in accordance with section 25. Accordingly, I have granted access to the Document in part.

Review rights

45. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹¹
46. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
47. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
48. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
49. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.¹⁴

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and (3FA).